



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Bert Ford, Administrator
Texas Liquor Control Board
Austin, Texas

Dear Sir:

Opinion No. 0-5346
Re: Would the Liquor Control Board be authorized to apply Senate Bill No. 117, Acts of the 48th Legislature, Regular Session, 1943, to the pending application of the named applicant and to reject it now on the grounds that an alien is not qualified as a matter of law to hold a license? And a related question.

Your letter of May 27, 1943, requesting the opinion of this department on the questions stated therein, reads as follows:

"There has heretofore been presented to your office all papers relative to the application of one Martin Abogado for a Wine and Beer Retailer's Permit sought in El Paso, Texas.

"After the District Court had issued an order on appeal from the action of the County Judge, and in which the District Court reversed the order of the County Judge, the decision of the District Court was appealed to the Court of Civil Appeals, and according to our information from Mr. Guinn, the County Attorney at El Paso, the Court of Civil Appeals dismissed the appeal in April.

"It was agreed by all parties concerned, including the District Judge of El Paso, that the application of Martin Abogado would be held in

Honorable Bert Ford, page 2

suspense, pending appellate action, and that the applicant would be permitted to sell beer during the pendency of appeal.

"The 48th Legislature enacted Senate Bill No. 117 with sufficient support to give it emergency status, and it became law with the Governor's signature on May 14, 1943. This Bill carried in Section 14 thereof a provision enacting in the law a new Section 43-B, reading as follows:

"When the terms 'citizen of Texas' and 'citizen of this state' are used in this Act, they shall mean not only citizenship in Texas, as required by this Act, but shall also require citizenship in the United States.'

"The issue in the Martin Abogado case was whether an alien could obtain a license to sell beer. Since any question about this matter is now moot, we should like to have your opinion in response to the following questions:

"1. Would the Board be authorized to apply the qualifications of new law to the pending application of Martin Abogado, and to reject it now on the grounds that an alien is not qualified as a matter of law to hold a license?

"2. Would the Board now have the legal authority to cancel licenses held by aliens in El Paso County, heretofore issued under the orders of the County or District Court, but which licenses will not expire under their own terms for some time to come?"

Generally speaking Senate Bill No. 117, Acts of the 48th Legislature, Regular Session, 1943, is a comprehensive Act amending many provisions of the Texas Liquor Control Act. Section 43-B which is quoted above in your letter is a new section added to the Act. Section 26 of said Senate Bill No. 117 reads in part as follows:

"That the repeal or amendment of any Section or any portion of a Section of the Texas Liquor Control Act by the enactment of this Act shall not

Honorable Bert Ford, page 3

affect or impair any act done, or right vested or accrued, or any proceeding, suit, or prosecution had or commenced in any cause before such repeal or amendment shall take effect; but every such act done, or right vested or accrued, or proceeding, suit, or prosecution had or commenced shall remain in full force and effect to all intents as if such Section, or part thereof, so repealed or amended had remained in force, except that where the course of practice or procedure for enforcement of such right, or the conducting of such proceeding, suit, or prosecution shall be changed, the same shall be conducted as near as may be in accordance with this Act. No offense committed and no liability, penalty, or forfeiture, either civil or criminal, incurred prior to the time when any Section or part thereof shall be repealed or amended by this Act, shall be discharged or affected by such repeal or amendment; but prosecution and suits for such offenses, liabilities, penalties or forfeitures, shall be instituted and proceeded with in all respects as if prior statute, or part thereof, had not been repealed or amended, except that where the mode of procedure or matters of practice have been changed by this Act, the procedure had after this Act shall have taken effect in such prosecution or suit shall be, as far as practicable, in accordance with this Act."

Article 667-5, Vernon's Annotated Penal Code, provides in part:

"Any person desiring a license as manufacturer, distributor, or retail dealer may in vacation or in termtime file a petition with the County Judge of the County in which the applicant desires to engage in such business which petition shall state as follows:

"If a manufacturer:

"(1) That he is a law abiding, taxpaying citizen of this State, over twenty-one (21) years of age; that he has been a resident of the county wherein such license is sought for a period of more than one year next preceding the filing of

Honorable Bert Ford, page 4

such petition; and that he has not been convicted of a felony within two (2) years immediately preceding the filing of such petition.

"

"If a retail dealer:

"(1) The same information required of a manufacturer.

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Subsection 16 of Article 666-15, Vernon's Annotated Civil Statutes, provides in part:

"The Board is authorized to issue Wine and Beer Retailer's Permits. The holders of such permits shall be authorized to sell for consumption on or off the premises where sold, but not for resale, vinous and malt beverages containing alcohol in excess of one-half of one per cent by volume and not more than fourteen (14) per cent of alcohol by volume. All such permits shall be applied for and issued, unless denied, and fees paid upon the same procedure and in the same manner and upon the same facts and under the same circumstances, and for the same duration of time, and shall be renewable in the same manner, as required and provided to govern application for an issuance of Retail Beer Dealer's Licenses under Article II of this Act, and shall be subject to cancellation or suspension for any of the reasons that a Retail Beer Dealer's License may be cancelled or suspended, and upon the same procedure. The holders of Wine and Beer Retailer's Permits shall also be subject to all provisions of Section 22, Article II of this Act. All alcoholic beverages which the holders of such permits are authorized to sell may be sold with the same restrictions as provided in Article II governing the sale of beer, as to prohibited hours, local restrictions, age of employees, installation or maintenance of barriers or blinds in openings or doors,

Honorable Bert Ford, page 5

prohibition of the use of the word 'saloon' in the signs or advertising, and subject to the same restrictions upon consumption of wine as provided for beer in the case of Retail Beer Dealers in Section 15 of Article II of this Act. For the violation of any applicable provisions of Article II, the holders of such permits shall be liable for penalties provided in Article II; for the violation of any other provisions of this Act the holders of such permits shall be subject to penalties provided in Article I of this Act.

""

It is stated in American Jurisprudence, Volume 2, at page 470:

"A statute which arbitrarily prohibits aliens from engaging in ordinary kinds of business is unconstitutional. However, discrimination against aliens in the granting of a license to maintain a business which, though lawful, is subject to abuse and likely to become injurious to the community, is based upon a lawful legislative classification since it is not unreasonable to suppose that the foreign born, whose allegiance is first to their own country, and whose ideals of governmental environment and control have been engendered and formed under entirely different regimes and political systems, have not the same inspiration for the public weal, and are not as well disposed toward the United States as those who, by citizenship, are a part of the government itself. Thus, there is no question but that a state's denial, to persons not citizens of the United States, of the right to obtain licenses to sell intoxicating liquors is not an unlawful discrimination against aliens or an abridgment of their rights within the prohibition of the Fourteenth Amendment of the Federal Constitution.

""

We quote from A. L. R., Volume 39, page 348, as follows:

"There is no question but that a state's denial to persons not citizens of the United States of the right to obtain licenses to sell intoxicating

Honorable Bert Ford, page 6

liquors, is not an unlawful discrimination against aliens, or an abridgment of their rights within the prohibition of the 14th Amendment of the Federal Constitution. *Trageser v. Gray* (1890) 73 Md. 250, 9 L.R.A. 780, 25 Am. St. Rep. 587, 20 Atl. 905; *Bloomfield v. State* (1912) 86 Ohio St. 253, 41 L.R.A. (N.S.) 726, 99 N.E. 309, Ann. Cas. 1913D, 629.

"As stated in the *Trageser Case* (Md.) *supra*, no one can claim as a right any power whatever to sell intoxicating liquors, and the validity of the exercise by a state of its police power in regulating their sale does not, in the least degree, depend on any question as to the presence or absence of discrimination for or against particular persons, or classes of persons, and the legislature may lawfully grant the right to sell to a certain class and withhold it from others.

"The constitutionality of a statute requiring the holder of a liquor license to be a citizen of the United States was unquestioned in *Trimble's License* (1909) 41 Pa. Super. Ct. 370, where a liquor license was revoked upon the ground that the holder was an alien."

It is stated in the *Trimble case*, *supra*, "In *Hoy's License*, 3 Montg. Co. Li. 188, it was held that the holder of a liquor license must be a citizen of the United States, and that when such license is improperly granted to one not a citizen, such license upon application will be revoked."

However, the license in the above mentioned cases were granted to the aliens involved where the statute expressly provided in part: "Licenses shall only be granted to citizens of the United States."

With reference to your first question as heretofore stated, we assume that the person mentioned therein does not now have a license and is making an application for a license at this time. In view of the foregoing authorities, it is our opinion that an alien cannot qualify and receive a license under the Texas Liquor Control Act. Therefore, we respectfully answer your first question in the affirmative.

Honorable Bert Ford, page 7

In view of Section 26 of Senate Bill No. 117, supra, we answer your second question in the negative. However, when the licenses in question expire the holders of such licenses who are aliens would have no right to renew the same.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Ardell Williams*

Ardell Williams
Assistant

AW:db

RECORDED JUL 11 1945
Wm. J. Fanning
acting ATTORNEY GENERAL OF TEXAS

